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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO SOTELO-MORENO, Defendant and Appellant.	A151505 (San Mateo County Super. Ct. No. 15SF001647)

Antonio Sotelo-Moreno appeals from a judgment of conviction and sentence imposed after a jury found him guilty of murder and other offenses. He contends (1) the court had a sua sponte duty to instruct on the need for corroboration of accomplice testimony pursuant to CALCRIM No. 334 and to omit or modify other instructions; (2) the matter should be remanded for the trial court to consider dismissing or striking firearm use enhancements; and (3) the matter should be remanded for appellant to develop a record for a youth offender parole hearing. We will affirm the judgment and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

In December 2015, appellant was indicted on nine counts. Count 1 charged him with the murder of Nazario Barajas (Pen. Code, § 187, subd. (a)).[1] In connection with this count, the indictment alleged that appellant personally discharged a firearm and

[1] All statutory references are to the Penal Code.

caused great bodily injury and death (§ 12022.53, subd. (d)) and personally inflicted great bodily injury (§ 1203.075, subd. (a); § 12022.7).

Counts 2, 3, and 4 charged appellant with the attempted murder of Selina Castillo, Brenda Castillo, and Ivan Gomez (§ 187, subd. (a); § 664) and alleged that he acted willfully, deliberately, and with premeditation (§ 664, subd. (a)). As to counts 2 and 3, the indictment alleged that he personally used a firearm (§ 12022.5, subd. (a)); as to count 4, it was alleged that he personally used a firearm and caused great bodily injury (§ 12022.53, subd. (d)).

Count 5 charged appellant with shooting at an occupied vehicle (§ 246) and alleged that he personally used a firearm (§ 12022.5, subd. (a)).

Count 6 charged possession of a firearm by a felon (§ 29800, subd. (a)(1)) and alleged that he personally used a firearm (§ 12022.5, subd. (a)).

Counts 7, 8, and 9 charged appellant with assault with a semi-automatic firearm (§ 245, subd. (b)) and alleged that he personally used a firearm (§ 12022.5, subd. (a)). As to count 9, it was also alleged that he personally inflicted great bodily injury (§ 12022.7, subd. (a)). The matter proceeded to trial.

A. Evidence at Trial

1. Appellant's Initial Idea to Assault "Chayo"

On August 17, 2014, Maria Olivares-Gonzalez drove Jesenia Lupian, Herson Cruz, Brenda and Selina Castillo, and appellant from East Palo Alto to San Francisco.[2] During the ride, most of the group smoked marijuana and drank beer. After spending several hours smoking marijuana and drinking at one of the piers, they left San Francisco between 7:30 and 8:30 p.m.

During the drive back to East Palo Alto, appellant asked the others if they knew of a person named Chayo. He said that, because Chayo "wants to whoop on bitches; well, he's going to get his ass whooped today." He further stated, "You don't do shit like that in [East Palo Alto]. That shit doesn't go."

[2] For clarity, we will refer to these individuals (other than appellant) and Ivan Gomez by their first names and victim Nazario Barajas by his last name.

Brenda later spoke on the phone with a friend who invited her to a party that night. The friend knew Chayo—victim Nazario Barajas—and said he would be at the party as well. Brenda informed appellant.

Upon arriving in East Palo Alto, Herson and appellant were dropped off, and Maria, Jesenia, Brenda, and Selina continued "riding, smoking, [and] drinking" until they reached the party between 9:00 and 10:00 p.m. Victim Barajas and his friend, Ivan Gomez (Ivan), were already there.

Sometime during the party, Maria and Selina walked outside to Maria's car. Herson approached in a Lexus, from which appellant emerged and "told Maria to call [Jesenia] and Chayo out." Appellant seemed somewhat loud and angry. Maria responded, "I can't right now" and returned with Selina to the party.

Appellant also sent text messages to Brenda through Maria's phone, telling Brenda to bring Barajas outside. Then he called Brenda and was "mad" because "he wanted Chayo." Appellant "kept telling [Brenda] to bring him out, bring him out, what the fuck, what the fuck." Brenda refused. Appellant threatened, "If you don't do shit, I'll run up in there and shoot all you niggas." Brenda hung up on appellant and said to Maria, "You know what? Fuck him. I'm not going to do shit." Brenda did not speak or text with appellant any further that night.

2. Appellant Later Tracks Down Barajas and Kills Him

Just before midnight, after being at the party for about an hour or an hour and a half, Maria, Jesenia, Brenda and Selina decided to leave. They got into Maria's car and, at some point, were joined by Ivan and Barajas, who wanted a ride to a place where they could buy cocaine and marijuana.[3] Maria drove, Jesenia sat in the front passenger seat, and (left to right) Barajas, Brenda, Selina, and Ivan sat in the back seat.

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[3] Jesenia and Selina recalled that they had left the party and made it about a half a mile before Barajas called and asked for a ride to buy cocaine and marijuana; they returned to the party, picked up Barajas and Ivan, and drove them to an apartment where Barajas and Ivan obtained the drugs. Brenda recalled that Barajas and Ivan left the party with them in Maria's car.

After Ivan and Barajas got the drugs, some of the group snorted cocaine in the car. As they approached the home of Brenda and Selina, a vehicle began following them. When Maria stopped her vehicle at an intersection, the other vehicle pulled in front and stopped, blocking Maria from turning left or right. Jesenia, Brenda, and Selina recognized the vehicle as Herson's Lexus. Multiple witnesses described what happened next.

Ivan testified that appellant got out of Herson's car, ran to Maria's vehicle, opened the door closest to Ivan, and asked, "Where the fuck is Chayo?" When Ivan did not respond, appellant ran to the other side of Maria's vehicle and opened the door closest to Barajas. Appellant "did some type of movement, like, trying to grab [Barajas] or hit him." Barajas made a "blocking motion" in front of his face. Appellant "made a gesture like he was taking something . . . out of his waistband." Ivan saw a gun and heard multiple gunshots. Ivan scrambled out of Maria's vehicle, Selina fell on top of him, and then Maria's vehicle ran over his legs. Ivan later realized he had been shot in the arm.

Jesenia testified that she saw a "lot of people get out of" Herson's car and, although she could not see their faces, she recognized appellant's voice. Appellant approached Maria's vehicle, opened the door closest to Barajas, and asked, "Where's Chayo?" He and Barajas engaged in a brief physical altercation, and then Jesenia heard gunshots. Maria "sped off" with Jesenia and Barajas in the car. Barajas said, "Take me to the hospital." But once he stopped breathing, they returned to the scene and Jesenia saw Ivan, Brenda and Selina lying on the street.

Brenda testified that she observed appellant, Herson, an unidentified male, and a female get out of Herson's car. Appellant ran to Maria's vehicle, opened the door closest to Ivan, and asked, "Are you Chayo? Are you Chayo?" When Gomez responded, "No, what the fuck," appellant ran to the other side of the car, opened the door closest to Barajas, and asked, "You're Chayo? You're Chayo?" Barajas replied, "Yes. What the fuck? What's up?" Appellant started punching Barajas in the face, and Barajas tried to protect himself. After a few seconds, the unidentified male handed a gun to appellant. Appellant aimed the gun at Barajas, and Brenda turned away, hugged Selina, and heard

gunshots. When the gunshots stopped, Brenda opened the door next to Ivan and pushed Selina and Ivan out of the car, and the three fell onto the street. Maria "hit reverse," and then "hit drive" and "took off." Brenda realized she had been shot in the thigh.

Selina testified that she saw Cruz, appellant, and another person emerge from Herson's vehicle. Appellant went to Maria's vehicle on Ivan's side, opened the door, and asked Ivan if he was Chayo. Ivan said, "No. What the fuck?" Appellant went to the other side of the car, opened the door, and "asked [Barajas] if that was him." Barajas responded, " 'Yes, that's me. What's up.' " Barajas and appellant started fighting. After a few seconds, Selina heard four or five gunshots. Brenda pushed Selina out of the vehicle and onto the street. Selina discovered that she had been shot and was later treated for a gunshot wound in her lower back.

3. Police Response and Autopsy Findings

At approximately 11:30 p.m. on August 17, 2014, Officer Sergio Ramos of the East Palo Alto Police Department responded to a report of several gunshot victims at the intersection of Georgetown Street and Purdue Avenue. Ramos located Barajas in the rear seat of a car, unconscious and suffering from an apparent gunshot wound in the abdomen. He died at the scene. At a later autopsy, a forensic pathologist identified five gunshot entry wounds, three exit wounds, and three grazing wounds, and concluded the death was caused by multiple gunshot wounds.

B. Jury Verdict and Sentence

The jury convicted appellant on all counts of murder, shooting at an occupied vehicle, possession of a firearm by a felon, and assault with a semi-automatic firearm, and found true several enhancement allegations.[4]

The court sentenced appellant to state prison for 60 years to life, comprised of 25 years to life for murder; a consecutive 25 years to life as an enhancement under section

[4] During the trial, the court granted the prosecutor's motion to dismiss counts 2, 3, and 4 (attempted murder) and related allegations, and granted appellant's motion for acquittal on the great bodily injury enhancement (§ 12022.7, subd. (a)) alleged in connection with count 9.

12022.53, subdivision (d); a consecutive six years for assault with a firearm; and a consecutive four years as an enhancement under section 12022.5, subdivision (a). The court also imposed concurrent terms on the two other counts of assault with a firearm and two enhancements under section 12022.5, subdivision (a), and stayed sentence under section 654 as to his conviction for possession of a firearm, conviction for shooting at an occupied vehicle, and a related enhancement under section 12022.5, subdivision (a).

This appeal followed.

II. DISCUSSION

A. Jury Instructions

Appellant contends the court erred by not sua sponte instructing the jury under CALCRIM No. 334 that accomplice testimony cannot be used to convict a defendant unless the testimony is corroborated. In this regard, appellant argues there was substantial evidence that Brenda was subject to prosecution for appellant's murder of Barajas, because Brenda facilitated the assault by telling appellant where Barajas would be that night. Appellant further contends that, because Brenda was thus an accomplice, the court was required to modify CALCRIM No. 301 (single witness's testimony is sufficient) and withhold or modify CALCRIM No. 373 (jury must not speculate whether other persons involved in the crimes were prosecuted). He asserts that, but for these instructional errors, "it is reasonably probable that the jury would have convicted [him] of second rather than first degree murder." We disagree.

1. CALCRIM No. 334

CALCRIM No. 334 tells a jury that it must determine if a witness is an accomplice of the defendant: "Before you may consider the [testimony of a particular witness] as evidence . . ., you must decide whether [the witness] was [an] accomplice . . . . A person is an accomplice if he or she is *subject to prosecution for the identical crime charged* against the defendant. Someone is subject to prosecution if: [¶] 1. He or she personally committed the crime; [¶] OR [¶] 2. He or she knew of the criminal purpose of the person who committed the crime; [¶] AND [¶] 3. He or she intended to, and did in fact, []aid, facilitate, promote, encourage, or instigate the commission of the crime . . . . [¶] The

burden is on the defendant to prove that it is more likely than not that [the witness was an accomplice]." (Italics added.)

CALCRIM No. 334 further informs jurors that, if the witness is an accomplice, the jury cannot rely on the accomplice's testimony unless there is evidence of corroboration: "If you decide that a [witness] was an accomplice, then you may not convict the defendant of [the charged crime] based on his or her [testimony] alone. You may use [the testimony] of an accomplice . . . to convict the defendant only if: [¶] 1. The accomplice's [testimony] is supported by other evidence that you believe; [¶] 2. That supporting evidence is independent of the accomplice's [testimony]; [¶] AND [¶] 3. That supporting evidence tends to connect the defendant to the commission of the [crime]. [¶] Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime[s], and it does not need to support every fact [about which the accomplice testified]. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime." (See § 1111.)

A court must instruct pursuant to CALCRIM No. 334 only if there is substantial evidence that a witness was an accomplice. (*People v. Boyer* (2006) 38 Cal.4th 412, 466 (*Boyer*).) The question, therefore, is whether there was substantial evidence that Brenda intentionally aided, facilitated, promoted, encouraged, or instigated the commission of the charged crimes. (CALCRIM No. 334; see *People v. Marshall* (1997) 15 Cal.4th 1, 40.)

a. No Evidence That Brenda Was Appellant's Accomplice

Appellant asserts that Brenda agreed with appellant that Barajas deserved to get his "ass whooped" for beating up a girl, learned from her friend where Barajas would be that evening, and apprised appellant. This evidence, he claims, made Brenda an accomplice to the assault. He then asserts that, as an accomplice to the assault, Brenda was also subject to prosecution for the murder of Barajas because it was a natural and probable consequence of the assault. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 260 ["a person encouraging or facilitating the commission of a crime [can] be held

criminally liable not only for that crime, but for any other offense that was a 'natural and probable consequence' of the crime aided and abetted"].)

There was no substantial evidence that Brenda was an accomplice to the *charged* crimes. Although Brenda testified that she thought it was wrong for a male to beat up a female, appellant cites no evidence that she expressed this view to appellant or verbally encouraged appellant to beat Barajas up.[5] And while Brenda told appellant that Chayo would be at a party that night, no assault ever occurred *at the party*. In fact, no assault occurred largely because Brenda and her friends refused to accede to appellant's demands that they bring Chayo out of the party, even though appellant threatened to shoot them all if Brenda declined.

As to the assault and shooting that constituted the *charged* crimes, there was no evidence whatsoever that Brenda was appellant's accomplice. Brenda denied having any contact with appellant after she refused to bring Barajas out of the party, and appellant cites no contrary evidence. There is no evidence that Brenda told appellant (or Herson) where they would be after the party, suspected appellant had followed them from the party, disclosed that Barajas was in Maria's car, or believed appellant would track them down later at an intersection near her house. Nor is there evidence that tipping off appellant about the party helped appellant find them later. (In fact, even when Barajas came out of the party with Brenda and her friends to get drugs, there was no assault.) In short, there was no indication that Brenda intended to commit, aid, promote, encourage, or instigate appellant's commission of the assault in Maria's car. To the contrary, thinking the vehicle following them and flashing its high beams was driven by the police, Brenda told Maria *not* to stop her car. And at trial, Brenda explained her reaction when

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[5] Brenda's testimony on this specific point, after stating that appellant wanted to "whoop" Chayo's ass (which she took to mean, "beating him up"), was as follows: "Q. What did he say? [¶] A. Like, 'You don't do shit like that in EPA. That shit doesn't go.' [¶] Q. And what did you take that to mean? [¶] A. Well, I kind of took it like, yeah, he's right. But I did not know that he was going to get to that point." The inference is that Brenda believed that a male beating up a girl was wrong, not that she expressed encouragement to appellant to beat up Bajaras. Further, Brenda claimed, she was unaware that appellant was really going to go through with it.

appellant began shooting: "I mean, I did not—did not know it was going to happen like that. And I didn't thought [*sic*] it was actually going to happen. I mean, everything just stopped, like, wow, this nigga really wants to get this dude, you know, like, something [that's] not even important to him. [¶] But that's the first thing that came to my mind, like, wow, I can't believe this is happening. And I couldn't do nothing. I mean, I was not next to a door; I was not driving. I mean, if I was driving, something else would have happened."

Appellant argues that, "as in *People v. Gordon* [(1973) 10 Cal.3d 460, 467], the prosecutor here effectively conceded that Brenda was an accomplice in statements that she made to the court and jury." Not so. In *Gordon*, the prosecutor told the jury in opening statement that two people committed the crime and that a person other than the defendant was involved. (*Id*. at pp. 467, 472.) Here, the prosecutor told the court at a motion hearing that there was an initial thought Brenda was "potentially" an accomplice, but that "*didn't* bear out." (Italics added.) In closing argument, the prosecutor said that Brenda had at least "some hand" in helping the defendant figure out where Chayo would be, and the "girls were trying to help bring him down," but the prosecutor never stated that Brenda committed or aided the charged assault or murder, and in any event the evidence showed otherwise.[6]

Appellant also contends the trial court implicitly found Brenda to be an accomplice "by stating that, unlike Selina and Brenda, 'Mr. Gomez was not involved in luring Mr. Barajas out of the party' (see 8 RT 1019)." But the court never stated that Selina or Brenda *had* lured Barajas out of the party, and, in fact, the evidence showed they had not.

Appellant fails to demonstrate that the court had a sua sponte duty to instruct on corroboration of accomplice testimony pursuant to CALCRIM No. 334.

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6 In context, the prosecutor's statement that the "girls were trying to help bring him down" may have been a reference to appellant's *attempt* to get Maria, Jesenia, and Brenda to bring Barajas out of the party; the prosecutor was describing appellant's involvement of other people in his plan, and there was no evidence that Brenda or her friends did bring Barajas out of the party to be assaulted by appellant. ~(RT 878-880)

b. Harmless Error

A failure to instruct with CALCRIM No. 334 is harmless if the record reveals that there was, in fact, sufficient evidence of corroboration. (*Boyer, supra*, 38 Cal.4th at p. 467.) Corroborating evidence must be independent from the accomplice's testimony and is " 'sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.' " (*People v. Valdez* (2012) 55 Cal.4th 82, 148.) The corroboration may be slight, it does not need to establish every element of the offense, and it "does not need to support every fact . . . [(]about which the accomplice testified)." (CALCRIM No. 334; see *Boyer, supra*, 38 Cal.4th at p. 467; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1022 (*Vu*) ["independent evidence need not corroborate the accomplice as to every fact on which the accomplice testifies"].) Once there is evidence linking the defendant to the crime, all of the accomplice's testimony can be relied upon. (*People v. Davis* (2005) 36 Cal.4th 510, 543–544.)

Here, the testimony of witnesses besides Brenda plainly linked appellant to the charged crimes. Jesenia and Selina recalled appellant's statements that he wanted to fight Chayo. Jesenia, Selina, and Ivan all identified appellant as the individual who approached Maria's car, asked for Chayo, and attacked Barajas in the vehicle, and further testified that they then heard gunshots. In light of this corroboration, the court's failure to instruct the jury pursuant to CALCRIM No. 334, even if error, was harmless. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 302.)[7]

Appellant argues that one specific fact to which Brenda testified—that appellant threatened to shoot everyone at the party if she did not bring Barajas outside—was not corroborated by other evidence. This is significant, he claims, because appellant's statement was the only direct evidence of premeditation and deliberation.

Appellant misperceives the corroboration required for accomplice testimony. There is no need for corroboration as to each fact or statement the accomplice has

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[7] Indeed, there was no dispute at trial that appellant was the one who assaulted, shot, and killed Barajas. Defense counsel even told jurors so in opening statement and closing argument. ~(3RT 115-116; 7RT 913; AOB 36)~

described. (CALCRIM No. 334; *Vu*, *supra*, 143 Cal.App.4th at p. 1022.) All that is required is evidence linking the defendant to the crime; once that link is shown, all of the accomplice's testimony can be used. (*Davis*, *supra*, 36 Cal.4th at pp. 543–544.)

Moreover, even if the corroborating evidence was insufficient to render the omission of CALCRIM No. 334 harmless, reversal is not required unless it is reasonably probable the defendant would have obtained a more favorable result if the instruction had been given and the jury had disregarded the accomplice's testimony. (*Gonzales and Soliz*, *supra*, 52 Cal.4th at p. 304.) There was overwhelming evidence of premeditation and deliberation here, including appellant's avowed intent to "whoop [Barajas's] ass," his travel to the party where he believed Barajas to be, his anger in demanding that Barajas be brought out to him, his effort to track Barajas down hours later and some distance away near Brenda's house, the blows he leveled on Barajas in Maria's car, and his taking a semi-automatic weapon from a cohort (or his waistband), pointing it at Barajas, and repeatedly firing at Barajas as he sat in the car. There is no reasonable probability that the trial outcome would have been different if CALCRIM No. 334 had been given.

2. CALCRIM No. 301

Pursuant to CALCRIM No. 301, the court instructed: "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."

Appellant contends the court should have modified CALCRIM No. 301 to say the testimony of an accomplice cannot prove any fact without corroboration. As discussed *ante*, however, there was no substantial evidence that Brenda was an accomplice to the charged crime, so the modification was unnecessary. And since the instruction was correct in law and responsive to the evidence, appellant forfeited his argument that it was too general or incomplete by failing to object to the instruction at trial. (*People v. Andrews* (1989) 49 Cal.3d 200, 218.)

3. CALCRIM No. 373

Pursuant to CALCRIM No. 373, the court instructed: "The evidence shows that other persons may have been involved in the commission of the crimes charged against

the defendant. There may be many reasons why someone who appears to have been involved might not be a codefendant in this particular trial. You must not speculate about whether those other persons have been or will be prosecuted. Your duty is to decide whether the defendant on trial here committed the crimes charged."

Appellant contends the court should have omitted this instruction, or modified it by adding that the instruction did not apply to Brenda's testimony, so the jury could consider the fact that Brenda had not been prosecuted when assessing her credibility.

Appellant's argument is unavailing. It presupposes that Brenda was a person described in CALCRIM No. 373—someone who was involved in the commission of the charged crimes. And even if that were so, CALCRIM No. 373 did not preclude the jury from assessing her credibility in light of the fact that she was not prosecuted: the instruction merely told the jury not to be distracted from its task by "speculating about *whether*" someone besides the defendant has or would be prosecuted. (Italics added.)

In any event, any error in instructing the jury under CALCRIM No. 373 was harmless. In her testimony, Brenda disclosed that she had received immunity from the prosecution in exchange for her testimony, and the jury had the opportunity to assess her testimony in the light of this "promised immunity or leniency," as directed by the court's instructions on evaluating witness testimony (CALCRIM No. 226). (See *People v. Williams* (1997) 16 Cal.4th 153, 226 [although instructing the jury not to consider the lack of prosecution of others was erroneous where a non-prosecuted participant in the crime had testified, the error was harmless because the jury was instructed to evaluate the credibility of the witnesses in light of possible bias, interest or other motive for their testimony]; *People v. Carrera* (1989) 49 Cal.3d 291, 312–313 [error in precluding the jury from considering why others were not prosecuted for the crimes where witnesses had testified that a third person admitted that she, not the defendant, had committed the crime, but the error was harmless in light of other instructions].)[8]

[8] Appellant contends a heightened harmless error standard should apply when there are multiple instructional errors. ~(ARB 30-31)~ Appellant has not shown that there were

B. Remand for Discretion to Dismiss or Strike Firearm Use Enhancements

Sections 12022.5 and 12022.53 provide for sentencing enhancements related to the use of firearms in the commission of felonies. (§§ 12022.5, subds. (a)–(b), 12022.53, subds. (b)–(d).) Before January 1, 2018, the court was barred from striking those enhancements. (See former §§ 12022.5, subd. (c), 12022.53, subd. (h).) As of January 1, 2018, those sections give the court discretion at the time of sentencing to strike or dismiss the enhancement. (See Sen. Bill No. 620 (Stats. 2017, ch. 682, §§ 1–2).) These provisions apply retroactively to non-final judgments. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091; *People v. Robbins* (2018) 19 Cal.App.5th 660, 679.)

Appellant urges us to remand for the court to consider exercising discretion under these provisions. Respondent does not oppose the remand, and we will so order.

C. Record for Youth Offender Parole Hearing

When appellant was sentenced in June 2017, section 3051 provided that a person convicted of certain offenses committed before the person turned 18 years old, and for which the sentence was 25 years to life, would generally be eligible for release on parole during the 25th year of incarceration at a youth offender parole hearing. (§ 3051, subd. (b)(3).) Effective January 1, 2018, section 3051 applies to those who committed crimes when they were *25* years of age or younger, which would include appellant. (§ 3051, subd. (a), as amended by Stats. 2017, ch. 675, § 1.) The change in section 3051 applies retrospectively to all eligible youth offenders. (*People v. Franklin* (2016) 63 Cal.4th 261, 278 (*Franklin*).)

In *Franklin*, the court ruled that juvenile offenders must "have an adequate opportunity to make a record of factors, including youth-related factors, relevant to the eventual parole determination," including "any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors." (*Franklin, supra*, 63 Cal.4th at pp. 284, 286.) The court remanded the

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multiple instructional errors; nor has he demonstrated that a higher harmless error standard would apply, or that the claimed error was not harmless under either standard.

matter to ensure that the defendant had a sufficient opportunity to make a record for his future parole hearing. (*Id.* at pp. 286–287.) Appellant contends we should do so here.

Respondent contends remand is unnecessary, however, because the youth-related factors bearing on appellant's future suitability for parole were developed in connection with his motion to modify the verdict. Defense counsel's sentencing brief documented appellant's family background (including domestic violence), education, medical and psychiatric history (including diagnoses of depression and posttraumatic stress disorder), employment history, efforts to obtain a high school equivalency certificate, and a psychological evaluation. (See *People v. Cornejo* (2016) 3 Cal.App.5th 36, 68–70 [remand unnecessary where record demonstrates that defendants "were afforded sufficient opportunity to make a record"].)

Appellant counters with *People v. Rodriguez* (2018) 4 Cal.5th 1123, which held that the opportunity to introduce evidence of youth-related factors before section 3051 pertained to the juvenile was inadequate, because he would "not have had reason to know that the subsequently enacted legislation would make such evidence particularly relevant in the parole process." (*Id.* at p. 1131.) Moreover, appellant argues that his psychological evaluation was insufficient because the psychologist was unable to provide complete diagnoses or opinions of his mental state, and the evaluation was not directed to his maturity level or other relevant youth-related factors.

We conclude that the best course is to remand for appellant to make a record for a future youth offender parole hearing.

III. DISPOSITION

The matter is remanded for the trial court to exercise discretion to strike or dismiss enhancements imposed under Penal Code sections 12022.5 and 12022.53, and for appellant to have an opportunity to make a record for a future youth offender parole hearing. The judgment is otherwise affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BURNS, J.

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